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NTSB Order No. EA-4370

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 6th day of June, 1995

DAVID R. HINSON,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-12625
v.)	
)	
THOMAS A. ROSENBERGER,)	
)	
Respondent.)	
)	

OPINION AND ORDER

Respondent has appealed from the oral initial decision of Administrative Law Judge Patrick G. Geraghty, issued on December 1, 1992, following an evidentiary hearing.¹ The law judge found, as the Administrator had alleged, that respondent had violated 14 C.F.R. 121.547(a).² The law judge reduced the suspension of

¹The initial decision, an excerpt from the hearing transcript, is attached.

²§ 121.547(a) and (b) read:

(a) No person may admit any person to the flight deck of an aircraft unless the person being admitted is --

respondent's air transport pilot certificate from the 30 days proposed by the Administrator to 23 days.³ In view of the concerns discussed below, we dismiss the Administrator's complaint and suspension order.

The facts are not in dispute. On August 25, 1991, respondent and two flight attendants arrived at the gate at Las Vegas' McCarran International Airport to board America West Flight 1454 from Las Vegas, NV to Houston, TX. They were the aircraft's crew for its return flight from Houston to Las Vegas.

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- (1) A crewmember;
- (2) An FAA air carrier inspector, or an authorized representative of the National Transportation Safety Board, who is performing official duties;
- (3) An employee of the United States, a certificate holder, or an aeronautical enterprise who has the permission of the pilot in command and whose duties are such that admission to the flight deck is necessary or advantageous for safe operations; or
- (4) Any person who has the permission of the pilot in command and is specifically authorized by the certificate holder management and by the Administrator.

Subparagraph (2) of this paragraph does not limit the emergency authority of the pilot in command to exclude any person from the flight deck in the interests of safety.

(b) For the purposes of paragraph (a)(3) of this section, employees of the United States who deal responsibly with matters relating to safety and employees of the certificate holder whose efficiency would be increased by familiarity with flight conditions, may be admitted by the certificate holder. However, the certificate holder may not admit employees of traffic, sales, or other departments that are not directly related to flight operations, unless they are eligible under paragraph (a)(4) of this section.

The Administrator withdrew, without explanation, an additional charge that respondent had violated § 121.547(c) (which prohibits persons from sitting in the jumpseat unless there is also a seat in the cabin available for them).

³The Administrator does not appeal this reduction.

Tr. at 67. The un rebutted evidence indicates that, on arrival at the gate, respondent was met with confusion and passenger distress. The flight was overbooked. Respondent proceeded to complete an authorization pass so that he could fly in a flight deck jumpseat, freeing up a seat in the passenger cabin. Tr. at 75. He was then told by the gate agent that the scheduled captain of the flight would be 1 and 1/2 hours late because he had not been advised of a timetable change. In view of the unhappy customers, the delay in waiting for the assigned pilot, and other reasons, respondent offered to pilot the flight, and America West approved his substitution.⁴

Respondent was next advised that there would be no room in the cabin for the two flight attendants (CSRs, customer service representatives) who, as he, had been scheduled to "deadhead" to Houston to crew the return flight to Las Vegas. He was told that the only way to seat the CSRs in the cabin would be to leave behind ("bump") two members of a larger traveling family.⁵ Respondent was concerned that, if he did so, there would be passenger reaction that could affect flight safety. Tr. at 71, 81, Exhibit C-2.

Respondent looked for an alternative. He testified that he reviewed the inflight manual and the Federal Aviation Regulations (FARs). He believed that he was permitted to deviate from flight

⁴See Exhibit C-2.

⁵The gate agent had already sought volunteers to take a later flight. Apparently, there were none. Tr. at 93.

rules where safety required, and he interpreted the manual and the FARs to mean that the CSRs were crewmembers permitted to ride in the cockpit jumpseats.⁶ Respondent also relied on § 121.547(a)'s grant of emergency authority to the pilot in command. However, he misread that authority to allow him to **include** (rather than **exclude**) any person on the flight deck in the interests of safety.⁷

Respondent piloted the flight with the two attendants in the cockpit jumpseats. It appears that during the flight the attendants performed few if any flight duties. Tr. at 61, 78. On appeal, respondent argues that his actions were a reasonable and good-faith response to the situation and that suspension of his certificate is not warranted.⁸

⁶Respondent's testimony suggests that he was misled by an incorrect understanding of the word "duty." "Crewmember" is defined in the FARs as a person assigned to perform duty in an aircraft during the flight time. Respondent believed, and his view was reinforced by the Flight Operations Manual, that deadheading crew members were on duty. See Exhibit R-2 ("flight crews who are deadheading . . . are considered to be on duty"). The Inflight Operations Manual has since been revised specifically to prohibit CSRs from jumpseating. Exhibit R-1.

⁷At the hearing, respondent offered additional interpretations of the rules that, he believes, support his action. He testified, however, that he did not study these added issues until later. At this stage, these additional arguments need not be addressed.

⁸The Administrator, at the hearing, apparently believed that respondent's sole motivation was to assist the carrier, which was operating under the protection of the bankruptcy court. The record does not support this belief. Indeed this view is inconsistent with that of the Administrator's own witness Bailey. See Tr. at 26-27, 37, 39 and Exhibit C-8. See also Exhibit C-9, report of CSRs. The Administrator also urged, but failed to prove, that any of the carrier's manuals available to respondent

The CSRs do not appear to have been crewmembers as that term is defined in the FARs, as they had no actual flight duties, and respondent does not argue this point on appeal. Paragraph (1) of § 121.547(a), therefore, does not authorize respondent's action.

Counsel for the Administrator also repeatedly noted that the Administrator had not specifically authorized the attendants to fly jumpseat, thus indicating that paragraph (4) does not legitimize respondent's action, and respondent, again, does not argue otherwise. The Administrator also demonstrated that paragraph (2) does not apply.

Paragraph (3), however, authorizes admission to the flight deck of:

An employee of the United States, a certificate holder, or an aeronautical enterprise who has the permission of the pilot in command and whose duties are such that admission to the flight deck is necessary or advantageous for safe operations [.]

Emphasis added. At the hearing, the Administrator did not directly discuss this section.

The establishment of a prima facie case of violation of § 121.547(a), however, required the elimination of availability of even those subsections that were not relied on by respondent.

This is so because, even if respondent were unable to cite chapter and verse, if he had in fact the authority necessary to seat the attendants in the cockpit, he cannot be found in violation of this rule. To discharge his burden of proof, the

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unambiguously prohibited CSRs from riding jumpseat, and the law judge did not question respondent's credibility on any of these points.

Administrator had to show that paragraph (a)(3) also did not apply. Because the Administrator failed to do so, he failed to meet his burden of proof and the complaint must be dismissed.

In fact, the record would support a finding that the two flight attendants were "employees of a certificate holder" who had the permission of the pilot in command. We do not decide whether respondent met the remainder of paragraph (a)(3)'s requirements in seating the CSRs. The record is non-existent on the matter, and there is no useful precedent. We note that the regulation, at § 121.547(b), includes explanatory language stating that paragraph (a)(3) may not be used to admit employees of sales, traffic, or other departments not directly related to flight operations, unless they have the permission of the Administrator and management, as per paragraph (a)(4). This would suggest that flight attendants are within the group admissible to the cockpit at the discretion of the pilot in command, and subject to limitations within the paragraph, a conclusion entirely consistent with the fact that flight attendants routinely provide meals and refreshment to the cockpit crew.

The flight attendants' admission to the flight deck could also be seen, in the broad sense, as "advantageous for safe operations," as paragraph (a)(3) requires. Their training makes them valuable in an emergency and it could easily be argued that additional flight attendants would be advantageous should an inflight problem develop or that flight attendant observation of

flight deck operations would contribute to better long-term job performance. Under the terms of paragraph (b), flight attendants could also be included in the group of "employees of the certificate holder whose efficiency would be increased by familiarity with flight conditions."

We are, of course, aware of the safety issues that would surround any determination that flight attendants could be routinely seated in the cockpit for duration of flight. We decide this case on procedural grounds and merely offer one interpretation of the regulations based on the record as made in this proceeding. Of course, there may be issues and arguments that have not been brought to our attention, and should the Administrator see this issue as one requiring more clarification or specificity for the industry generally, he may modify his regulations accordingly, in which case the above discussion may be useful.⁹

⁹We also do not find that dismissal of the charge against respondent has any adverse implication for safety. As noted, the respondent testified that he acted in good faith. The Administrator's principal witness testified that the safety of Flight 1254 had not been compromised. Tr. at 47. And, as a result of the ambiguity/misunderstanding reflected in this proceeding, the Administrator required an amendment to the carrier's flight attendant Inflight Operations Manual to state that CSRs may not occupy the jumpseat.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is granted;
2. The initial decision is reversed; and
3. The Administrator's complaint is dismissed.

HALL, Chairman, FRANCIS, Vice Chairman, and HAMMERSCHMIDT, Member of the Board, concurred in the above opinion and order.